Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

CONNIE BURTON,

Petitioner,

v.

TAMPA HOUSING AUTHORITY and
UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1437d(*l*)(6) of Title 42 of the United States Code (Supp. IV 1998) provides that public housing leases must contain a clause stating that "any drug-related criminal activity on or off [the] premises engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."

The question presented is:

Whether a tenant may be summarily evicted from public housing, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug activity.

PARTIES TO THE PROCEEDING

Connie Burton, Tampa Housing Authority, and the United States Department of Housing and Urban Development.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Allegheny County Housing Auth. v. Hibbler, 748 A.2d 786 (Pa. Commw. Ct. 2000) 8

Burton v. Tampa Housing Authority, 271 F.3d 1274 (11th Cir. 2001) 1, 3, 7

Chavez v. Housing Auth. of El Paso, 973 F.2d 1245 (5th Cir. 1992) 6

Housing Auth. for Prince Georges County v. Williams, 784 A.2d 621 (Md. Ct. Spec. App. 2001) 8

Housing Auth. of City of Pittsburgh v. Fields, 772 A.2d 104 (Pa. Commw. Ct. 2001) 8

Housing Auth. of Joliet v. Keys, 2001 Ill. App. LEXIS 1457 (Ill. App. Ct. Dec. 14, 2001) 8

Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001) (en banc), *cert. granted*, 150 L. Ed. 2d 805, 122 S. Ct. 24 (2001), 151 L. Ed. 2d 10, 122 S. Ct. 338 (2001)) ...*passim*

STATUTES & MISC.

24 C.F.R. § 966.4(f)(12)(i) 3

28 U.S.C. § 1254(1) 1

42 U.S.C. §§ 1437 *et seq.* 2

42 U.S.C. § 1437b 2

42 U.S.C. § 1437d 2, 6, 7

Pub. L. No. 101-625, § 504, 104 Stat. 4185 2

Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836 2

Supreme Court Rule 10(a) 1

PETITION FOR A WRIT OF CERTIORARI

Connie Burton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of court of appeals (Pet. App. 1-25) is reported at 271 F.3d 1274 (11th Cir. 2001). The opinions of the district court (Pet. App. 26-37) are unreported.

JURISDICTION

The opinion of the court of appeals was entered on November 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a), because the decision of the Eleventh Circuit directly conflicts with that of the Ninth Circuit in *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001), *cert. granted*, 150 L. Ed. 2d 805, 122 S. Ct. 24 (2001), 151 L. Ed. 2d 10, 122 S. Ct. 338 (2001) (consolidated). This Court has already accepted jurisdiction in the *Rucker* case to determine precisely the same issue as that presented in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Fifth Amendment to the United States Constitution, the United States Housing Act

of 1937, 42 U.S.C. § 1437d(*l*) (Supp. IV 1998), and regulations of the Department of Housing and Urban Development are set forth at Pet. App. 38-42.

STATEMENT

This case concerns the meaning of a clause that a statute and regulations require each public housing authority (PHA) to include in leases of public housing units that receive federal housing assistance.[1] The clause

[1] The United States Housing Act of 1937 (Housing Act), 42 U.S.C. §§ 1437 *et seq.*, authorizes the Secretary of Housing and Urban Development (HUD) to make loans or loan commitments to public housing agencies to help finance the development, acquisition, or operation of low-income housing projects by such agencies. 42 U.S.C. § 1437b(a).

In 1988 and 1990, Congress amended the Housing Act to require that public housing leases provide that any drug-related criminal activity on or near public housing premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4185 (codified at 42 U.S.C. 1437d(*l*)(5) (1994)). The provision was again amended in 1996 by changing the phrase "on or near such premises" to "on or off such premises." Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836. It is now codified at 42 U.S.C. 1437d(*l*)(6) (Supp. IV 1998). See also 42 U.S.C. 1437d(*l*) (1994 & Supp. IV 1998) (defining "drug-related criminal activity" to mean "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in [21 U.S.C. 802]").

provides that drug-related criminal activity by specified individuals is a ground for eviction.

The Tampa Housing Authority (THA) instituted eviction proceedings against Petitioner Connie Burton (Burton) pursuant to that clause. Burton instituted this action in the United States District Court for the Middle District of Florida to obtain an injunction against her eviction. The district court granted THA's motion for summary judgment. The court of appeals affirmed the district court's decision, thereby creating a conflict with the Ninth Circuit on an issue that is currently pending certiorari review in this Court. *See Burton v. Tampa Housing Authority*, 271 F.3d 1274, 1277 (11th Cir. 2001) (adopting approach of dissent in *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (en banc), *cert. granted*, 150 L. Ed. 2d 805, 122 S. Ct. 24 (2001), 151 L. Ed. 2d 10, 122 S. Ct. 338 (2001) (consolidated)).

HUD's regulation establishing mandatory lease terms for public housing tenants requires leases to impose an obligation on the tenant:

> (i) To assure that no tenant, member of the tenant's household, or guest engages in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents; or
>
> (B) Any drug-related criminal activity on or off the premises.

24 C.F.R. § 966.4(f)(12)(i).

1. Burton is a single mother of three who has lived in THA housing for approximately sixteen years. (Pet. App. 2). She is an outspoken public housing activist who has served as president of the residents' association in her public housing project. Burton also worked as a property manager for THA for three years.

In 1998, to help her adult son Narada Burton obtain a job with THA, Burton added him to her lease as a household member. (*Id.*)[2] Six months later, Narada was arrested for allegedly participating in a drug transaction. (*Id.*) The drug transaction took place on THA property, but away from Burton's apartment. (*Id.*) Burton knew nothing of the alleged criminal activity. (*Id.*)

THA filed an action to evict Burton based on her adult son's alleged off-premises criminal activity. THA's routine for such evictions involved reviewing arrest reports to determine whether anyone listed as a THA tenant (or that evidence established was a guest of a THA tenant) was arrested near THA grounds. If so, THA issued a seven-day eviction notice or began eviction proceedings automatically. THA exercised no discretion in deciding whether to evict its tenants. Indeed, one of the original plaintiffs below was a 71-year-old woman threatened with eviction after her 38-year-old son was arrested, even though he had not lived with his mother for 20 years.

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[2] THA required Narada to be added to Burton's lease as a prerequisite to hiring him in its "New Beginnings" program. (See Pet. App. 2).

2. In 1999, THA instituted eviction proceedings in state court against Burton and four other public housing tenants who were plaintiffs in this case.[3] In each case, THA alleged that the tenant had violated the provision of his or her lease that obligated the tenant to "assure that Resident, Members of Resident's household, guests (as defined herein) or other person under Resident's control, shall not [engage in] . . . (ii) drug-related criminal activity (as defined herein) on or off THA's property, by Resident, members of Resident's household or guests (as defined herein)." (Pet. App. 28).

3. Following the institution of eviction proceedings against her in state court, Burton commenced this action in the United States District Court for the Middle District of Florida. Burton sought, inter alia, an injunction preventing THA from evicting Burton based on her lack of knowledge of the alleged criminal activity that gave rise to the eviction notice.

The district court granted THA's motion for summary judgment and denied Burton's motion for summary judgment. In disposing of Burton's claims, the district court relied heavily on the panel opinion in *Rucker v. Davis*, 203 F.3d 627 (9th Cir. 2000), subsequently vacated by the *en banc* Ninth Circuit.[4] The district court ruled (1) that the Public Housing Act authorized THA to institute

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[3] THA settled its dispute with the four other plaintiffs, who dismissed their suits. (Pet. App. 27 n.2).

[4] *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001). This Court has granted certiorari to review *Rucker*, and has set it for oral argument this month. *See* 150 L. Ed. 2d 805, 122 S. Ct. 24 (2001), 151 L. Ed. 2d 10, 122 S. Ct. 338 (2001) (consolidated).

eviction proceedings summarily based on police arrest logs, without exercising any discretion;[5] (2) that the "One Strike – You're Out" policy rationally served the legislative purpose of cleaning up crime in public housing without imposing undue litigation costs;[6] (3) that the panel opinion in *Rucker* and the Fifth Circuit's opinion in *Chavez v. Housing Auth. of El Paso*, 973 F.2d 1245 (5th Cir. 1992) warranted judgment against Burton on her due process, equal protection and First Amendment claims;[7] and (4) that Florida law provided Burton sufficient safeguards to withstand her procedural due process claim.[8]

4. Burton appealed; the Eleventh Circuit affirmed. The Eleventh Circuit's opinion relied heavily on the dissent in the *Rucker en banc* decision, which had issued during the pendency of Burton's appeal. The Eleventh Circuit did not discuss the majority opinion in *Rucker*, but rather quoted Judge Sneed's dissent copiously, acknowledging that it was "following [Judge Sneed's] lead." (Pet. App. 5 and *passim*).

In that light, the Eleventh Circuit ruled that the language of § 1437d(*l*)(6) reasonably served to accomplish Congress's goal of eradicating an "unsavory element" from public housing complexes. (Pet. App. 6). The court agreed with the *Rucker* dissent that Congress did not intend to write an "innocent tenant" defense into the "One Strike – You're Out" policy. (Pet. App. 12-14).

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[5] Pet. App. 30.

[6] Pet. App. 31.

[7] Pet. App. 32.

[8] *Id.* 32-33.

The Eleventh Circuit also ruled against Burton on her constitutional claims. Because housing is not a constitutional right, the court reasoned, Congress could act as a private landlord and condition housing on a tenant's accepting responsibility for drug-related activity, even if the activity took place without the tenant's knowledge. (Pet. App. 20-22). The Eleventh Circuit ruled that the "One Strike" policy did not impair Burton's First Amendment right to freedom of association because the eviction did not interfere with Burton's right to associate with her family. (Pet. App. 23).

5. The Eleventh Circuit's decision directly conflicts with the Ninth Circuit's opinion in *Rucker v. Davis*, which is currently pending certiorari review with this Court. The *en banc* Ninth Circuit held that Congress did not intend innocent tenants to be evicted who neither knew nor should have known of third-party drug-related activity.[9] The court noted that to rule any other way would lead to "serious questions under the Due Process Clause of the Fourteenth Amendment," because evicting innocent tenants could deprive them of property interests "without any relationship to individual wrongdoing."[10]

6. This Court has granted certiorari to review *Rucker*. The *Burton* case presents precisely the same issue – and reaches the opposite result – as that presented in the *Rucker* petition for certiorari, namely whether 42 U.S.C. § 1437d(*l*)(6) and the United States Constitution allow a PHA to evict a tenant who neither knew nor

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[9] *Rucker*, 237 F.3d at 1121-23.

[10] *Id.* at 1124-25.

should have known of the drug-related activity that prompted the eviction. Because this Court's decision in *Rucker* should apply with equal force to Burton's case, Burton respectfully urges that this Court grant her petition and resolve the conflict between the Eleventh Circuit and the Ninth Circuit, as well as addressing the conflict among the Eleventh Circuit and those state courts that have ruled that Congress did not intend "to mandate the eviction of innocent tenants." *Housing Auth. of Joliet v. Keys*, 2001 Ill. App. LEXIS 1457 (Ill. App. Ct. Dec. 14, 2001); *see also Housing Auth. for Prince Georges County v. Williams*, 784 A.2d 621 (Md. Ct. Spec. App. 2001) (ruling that court must hold evidentiary hearing and should not evict innocent tenant); *Housing Auth. of City of Pittsburgh v. Fields*, 772 A.2d 104 (Pa. Commw. Ct. 2001); *Allegheny County Housing Auth. v. Hibbler*, 748 A.2d 786 (Pa. Commw. Ct. 2000).

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 6, 2002

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13607

D. C. Docket No. 99-01238-CIV-T-26E

CONNIE BURTON,

Plaintiff-Appellant,

versus

TAMPA HOUSING AUTHORITY,
UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 7, 2001)

Before ANDERSON, Chief Judge, HULL and FAY, Circuit Judges.

FAY, Circuit Judge:

I. Introduction

The question presented by this appeal is whether or not a public housing authority may evict ignorant tenants, pursuant to a Congressional mandate, when the tenant, any member of the tenant's household, or any guest or other person under the tenant's control engages

in drug-related criminal activity on or near the public housing premises. The district court answered in the affirmative. We agree and affirm.

II. Factual and Procedural History

The facts giving rise to this case, as limited in this appeal, involve the Appellant, Connie Burton, a forty-three year-old single mother of three who has lived in Tampa Housing Authority ("THA") property for approximately sixteen years. Ms. Burton has resided at her current apartment in Robels Park for the past five years. On October 8, 1998, Ms. Burton added her adult son, Narada Burton, to her lease as a household member. This was a prerequisite to enable him to secure employment with the THA's New Beginnings program. This program was designed to employ ten first-time offenders with the THA's Department of Operations.[1] However, six months later, on April 15, 1999, Narada Burton was arrested for allegedly participating in a drug transaction on THA grounds.[2] It is undisputed that the transaction did not occur in Ms. Burton's apartment, nor that she was not aware of the criminal activity at the time.

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[1] Narada Burton had been previously arrested for drug-related criminal activity.

[2] On March 14, 2000, following a trial and a conviction, Narada Burton was sentenced to three years probation as a result of his felony conviction for his drug-related offense. He continued to reside with Ms. Burton in her THA apartment after his arrest.

Pursuant to its "One Strike" or "Zero Tolerance" policy, as authorized by 42 U.S.C. § 1437d(l)(6),[3] the THA commenced an action to evict Ms. Burton for breach of the terms of her Dwelling Lease Agreement. Embodied within this agreement is the understanding that it is the resident's obligation to ensure that no member of the resident's household, guest, or other person under the resident's control shall engage in any criminal activity on THA premises.[4] Ms. Burton now appeals the district court's denial of her motion for summary judgment, and the granting of summary judgment for THA.

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[3] 42 U.S.C. § 1437d(l)(6) reads:

Each public housing agency shall utilize leases which –

(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy;

[4] The relevant provision of the agreement reads:

Resident Obligations:

Resident agrees to be obligated as follows:

I. To assure that *Residents*, members of *Resident's* household, guests (as defined herein) or other person under *Resident's* control, shall not: (i) engage in any criminal activity, that threatens the health, safety or peaceful enjoyment of *THA's* property by other residents of *THA* or employees of *THA;* or (ii) drug-related criminal activity (as defined herein) upon or within two hundred (200) feet of *THA's* property, and such criminal activity shall be grounds for termination of this Agreement.

III. Issues Raised on Appeal

In appealing the district court's denial of her motion for summary judgment, and the granting of summary judgment for THA, Ms. Burton raises three points of alleged error concerning the district court's interpretation of 42 U.S.C. § 1437d(l)(6). Her first ground for appeal is whether the district court erred in ruling that a local public housing authority has the right to terminate the property rights of ignorant public housing tenants when a household member engages in drug-related criminal activity on public housing authority property. Ms. Burton advocates that an "innocent party" defense should be read into the statute, while the district court held that no such defense exists. Ms. Burton's second argument is that the district court erred in holding that her due process rights were not violated by the THA. She claims that the automatic deprivation of a tenant's property interest – that is, when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity – violates the due process clause. Finally, Ms. Burton alleges that the district court erred in holding that her freedom of association rights under the First Amendment were not violated. She claims that because of the one-strike policy, tenants are forced to restrict or eliminate their association with others who may potentially find themselves accused of illegal wrongdoing.

IV. Standard of Review

We review *de novo* the district court's grant of summary judgment, applying the same standard as the district court. *See Bivens Gardens Office Bldg., Inc. v. Barnett*

Banks of Fla., Inc., 140 F.3d 898, 905 (11th Cir. 1998). We view all evidence and factual inferences reasonably drawn from the evidence in the light most favorable to the non-moving party. *See Korman v. HBC Fla., Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999). "Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 750 (11th Cir. 2000) (citing Fed. R. Civ. P. 56(c)). "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." *Clemons v. Dougherty County, Ga.*, 684 F.2d 1365, 1369 (11th Cir. 1982). A grant of summary judgment may be upheld on any basis supported by the record. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993).

V. Discussion

In discussing this case we wish to acknowledge that we are following the lead of Judge Joseph Sneed, as set forth in his comprehensive dissent in *Rucker v. Davis*, 237 F.3d 1113, 1127 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3036 (U.S. Sep. 25, 2001) (No. 00-1770); 69 U.S.L.W. 3764 (No. 00-1781) (Oct. 1, 2001) (consolidated). Judge Sneed's dissenting opinion develops the arguments, analyzes the relevant cases, and sets forth the line of reasoning we find most persuasive.

In the late 1980's the drug epidemic had become corrosive in many aspects of our society. Public housing areas suffered along with many other segments of our society during the drug war. In 1988, in response to the deteriorating safety and overall quality of life due to

drug-related crime and violence in public housing, Congress granted to local public housing authorities ("PHAs") a "new tool" in striking a balance between providing affordable low income housing which was also safe to live in. *Id.* 42 U.S.C. 1437d(l)(6) was this tool, and it mandated that every lease entered into by a PHA include a provision permitting termination of tenancy when "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engaged in "drug-related criminal activity on or near public housing premises."

We believe the statutory language contained within the statute is unmistakably clear, and was based on reasonable findings that such legislation was necessary to eradicate the unsavory element that had infiltrated the public housing complexes. In assessing the validity of this statute, we find "nothing in the Constitution [which] prohibits the government from entering into reasonable lease provisions necessary to maintain the safety and structural soundness of its property." *Id.* "The increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures." 42 U.S.C. § 11901(4). The government, given its status as a landlord, must be given the authority to maintain its property at a habitable and safe standard for all of its tenants.

In answering the question of whether an ignorant tenant may be evicted based on a household members' or guests' drug use, the Department of Housing and Urban Development, ("HUD") offers guidance. HUD, the

agency charged with administering public housing, concluded that the statute did authorize the eviction of these ignorant tenants. 24 C.F.R. § 966.4(l)(1)(B); *Public Housing Lease and Grievance Procedures*, 56 Fed.Reg. 51,560, 51,567 (October 11, 1991). If this interpretation is a "permissible construction of the statute," then this court may not substitute its own judgment for that of HUD. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Because we find the statute to be clear on its face, HUD's interpretation is the only permissible construction of the statute. The cardinal principle of statutory construction is that "[w]here there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. 1, 8, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *United States v. Wilberger*, 18 U.S. 76, 95-96, 5 L.Ed. 37 (1820)). In the instant case, the statute authorizes eviction when a "public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "any drug related criminal activity." There is nothing ambiguous in this language.

Under § 1437d(l)(6), there are four categories of individuals whose drug-related criminal activity on or near public housing property will result in the tenant's eviction. A tenant can be terminated for his or her own criminal drug activity, a household member's,[5] a guest's,[6]

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[5] HUD defined "members of the household" as those individuals who are listed as such by name on the lease, as Narada Burton was in the instant case. 24 C.F.R. § 966.4(a)(2).

[6] HUD defines a "guest" as "a person in the leased unit with the consent of a household member." 24 C.F.R. § 966.4(d)(1).

or activity by any other person under the tenant's control. The structure of the statute suggests that all of these individuals are "*per se* under the tenant's control, and, therefore, the drug related criminal activity of anyone in one of these categories is cause for eviction." *Rucker*, 237 F.3d at 1129 (Sneed, J., dissenting). In this case, the plain meaning of the statute is obvious. The eviction of ignorant tenants due to the conduct of those associated with them is supported by a "reasonable rationale based on sound public policy." *Id.* at 1130.

Our interpretation and reading of the statute in question is reinforced by two related statutory provisions. The first is 42 U.S.C. § 1437d(c)(4)(A).[7] This statute, as it stood

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[7] 42 U.S.C. § 1437d(c) reads in relevant part:

> (4) the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to –
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> (A) . . . the establishment of tenant selection criteria which –
>
> (i) . . . give preference to families that occupy substandard housing (including families that are homeless or living in a shelter for homeless families), are paying more than 50 percent of family income for rent, or are involuntarily displaced . . . at the time they are seeking assistance under this chapter. . . .
>
> (iii) *prohibit any individual or family evicted from housing assisted under the chapter by reason of drug related criminal activity from having a preference under any provision of this subparagraph for 3 years* . . . except that the agency may waive the application of this clause under standards established by the Secretary (which shall include) *waiver for any member of a family*

through 1996, mandated that PHA's fulfill three independent duties. Under subsection (i), PHA's were required to allocate available housing units based on congressionally determined "preferences." These preferences were given to those in need, such as the homeless, or those using more than 50% of their income to pay rent. Under subsection (iii), an individual or family otherwise eligible for preferential placement in available housing was disqualified from receiving a preference for a period of three years if evicted from public housing because of drug-related criminal activity. And finally, under the final clause of subsection (iii), PHA's were specifically required to waive the three year disqualification period for those individuals who "clearly did not participate in and had no knowledge of such criminal activity."

These provisions served three functions: 1) established preferential tenant selection criteria; 2) disqualified those evicted because of drug activity from the established preferences for a period of three years; and 3) exempted from disqualification those evicted who clearly did not participate in and had no knowledge of the criminal activity. Thus under the statutory mandate of 1437d(c)(4)(A), PHA's were required to differentiate between two classes of tenants evicted from public housing for drug-related criminal activity. The first class was disqualified from preferential placement for three years if

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of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity . . .). (emphasis added)

they participated in or had knowledge of the criminal activity. The second class consisted of those individuals who were evicted for drug-related criminal activity, but did not participate in or have knowledge of that activity. These individuals were eligible to receive preferential treatment if they fit within one of the other criteria listed in § 1437d(c)(4)(A)(i).

When Congress created a distinction between tenants evicted for participating in or having knowledge of the wrongdoing, and those who did not have such knowledge, clearly it did so with the understanding that an ignorant tenant could be evicted for the drug-related criminal activity of another. While ignorant tenants were granted some reprieve by the receipt of preferential treatment in the waiver of the three year prohibition, they nevertheless were still subject to eviction proceedings. "Were that not so, there would have been no need for Congress to write a statute specifically waiving the applicability of the three-year prohibition period to the ignorant tenant." *Rucker*, 237 F.3d at 1132 (Sneed J., dissenting).

Additionally, 21 U.S.C. § 881(a)(7) lends support to the plain language interpretation of § 1437d(l)(6).[8] It is a

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[8] 21 U.S.C. § 881(a)(7) provides:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter

civil forfeiture statute that makes leasehold interests subject to forfeiture when used to commit drug-related crimes. It was amended concurrently with the passage of § 1437d(l) (6) as part of the Anti-Drug Abuse Act of 1988. Section 881(a)(7) specifically includes a knowledge requirement. Under it, no property otherwise subject to forfeiture may be seized if the owner establishes that the property was used in drug-related criminal activity "without the knowledge or consent of that owner."

Abiding by another canon of statutory construction, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); *United States v. Koonce*, 991 F.2d 693, 698 (11th Cir. 1993)). In creating a provision allowing an innocent owner to rebut the presumption of his or her participation or knowledge, Congress "clearly perceived that forfeitures of leaseholds under 21 U.S.C. § 881(a)(7) were to function differently from evictions under 42 U.S.C. § 1437d(l)(6) and legislated different regimes to govern the two." *Rucker*, 237 F.3d at 1132 (Sneed, J., dissenting). Because § 881(a)(7) did not provide for procedural protection to the owner, as

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punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

seizure was authorized once a violation occurred, Congress recognized that additional substantive protections were needed to prevent forfeiture against unknowing parties.

Similarly, in a 1989 emergency supplemental appropriation measure, Congress directed the Secretary of HUD to issue waivers of certain administrative procedures "as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy." *Dire Emergency Supplemental Appropriations and Transfers,* Pub.L. No. 101-45 § 404, 103 Stat. 97 (1989). Much like the forfeiture statute, this measure permits the taking of property without any pre-deprivation procedural protection. Therefore, Congress included a substantive protection for innocent tenants. However, a similar substantive right was not afforded to tenants who received the full procedural protections offered by HUD and local PHAs.

"Thus the 'innocent' owner exception in both 21 U.S.C. § 881(a)(7) and Pub.L. No. 101-45 § 404 reflected distinctly different congressional judgments about the proper tradeoff between procedural and substantive protections." *Rucker,* 237 F.3d at 1133 (Sneed, J., dissenting). Owners were given substantive protections, while tenants were not. While Congress concluded that the forfeiture statute should not be applied to owners who did not know of or consent to the illegal use of their property, it did not afford innocent tenants the same protection. In so doing, Congress granted broader authority to local PHAs in evicting its [sic] tenants than federal agents had to

seize property of innocent owners in drug-related criminal activity.

After further inspection into the Congressional treatment of § 1437d(l)(6), it is apparent to us that Congress specifically considered the ramifications of the statute, and intended precisely what the plain reading of the statute entails. In a 1989 congressional hearing, for example, the associate director of the American Civil Liberties Union (ACLU) argued that PHAs should not be allowed to evict a tenant unless they could prove that a tenant had knowledge and actual control of the wrongdoer. *See Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 90-91 (1989). In that hearing, the ACLU pointed to several instances where ignorant tenants were subjected to eviction proceedings. S. Doc. No. 101-234, at 86-87; Davidson, *Public Housing Aides Push to Evict Drug Users, Sometimes Violating the Rights of other Tenants*, Wall St. J., Jul 6, 1989 at A12. Yet after consideration, and even after amending the eviction provision, Congress did not include an innocent owner exception. *National Affordable Housing Act*, Pub.L. 101-625, § 504, 104 Stat. 4079 (1990) (substituting provisions relating to criminal activity threatening health, safety or peaceful enjoyment of other tenants for provisions relating to criminal activity generally). Following the lead in this decision was HUD's subsequent interpretation of 1437d(l)(6), who, contrary to the urging of legal aid at HUD's notice and comment hearings before implementing the statute, nevertheless interpreted the statute to grant discretion to PHAs to evict ignorant tenants. *See* 56 Fed.Reg. at 51,567.

Subsequently, Congress again amended the eviction statute, and again failed to include an innocent owner exemption. In fact the 1996 Amendment to § 1437d(l)(6) actually expanded the liability of an ignorant tenants [sic]. Tenants could now be evicted for drug-related criminal activity "on or off" public premises, as opposed to "on or near" the premises as the legislation had previously read. Pub.L. No. 104-120 § 9(a)(2), 110 Stat. 836 (1996). We place great significance on Congress's failure to include an innocent owner exemption. "We should not be quick to conclude that Congress either neglected to consider an issue related to its enactments or decided to avoid the issue and leave its resolution to the courts. . . . Instead we should search the statutory language and structure with the assumption that Congress knew what it was doing when it enacted the statute at issue." *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000); *In re Griffith*, 206 F.3d 1389, 1939 [sic] (11th Cir. 2000) (Congress is presumed to be aware of existing law when it passes legislation).

> Likewise, in this instance, Congress was aware that the administrative agency charged with implementing the eviction provision construed it to permit eviction of ignorant tenants. This interpretation had been challenged in [sic] both policy and constitutional grounds before Congress and in HUD's notice and comment procedures. Congress itself has shown its concern for ignorant tenants by protecting them with specific language in *other* legislative enactments. *See supra*. Congress, however, did not provide an exemption for ignorant tenants when it amended § 1437d(l)(6) in 1996. This court does

> not have the power to amend the statute. Congress clearly intended HUD's interpretation of the eviction [statute] to prevail.

Rucker, 237 F.3d at 1135 (Sneed, J., dissenting).

Lending further credence to our holding is the rather comprehensive scheme of legislative initiatives aimed at the public housing drug crisis with which § 1437d(l)(6) is intertwined. *See Anti-Drug Abuse Act of 1998*, Pub.L. No. 100-690, § 5101-5105 (1988); *Dire Emergency Supplemental Appropriations and Transfers*, Pub.L. No. 101-15, § 404 (1989); 42 U.S.C. § 1437d(c)(4)(A) (1990). Important to this analysis is the fact that § 1437d(l)(6) does not mandate eviction for all tenants whose household members or guests engage in drug-related criminal activity, but rather it permits their eviction, granting discretion to the PHAs to make this determination on a case-by-case basis.[9] "This was a reasonable decision on the part of Congress." *Rucker*, 237 F.3d at 1135 (Sneed, J., dissenting).

In the passage of § 1437d(l)(6), Congress was confronted with two overriding concerns in permitting the eviction of innocent tenants. Conditions in the public housing complexes had deteriorated to such deplorable conditions due to the rampant drug use, that many of

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[9] Local PHAs operate "with tax funds provided from federal as well as from state sources. The State . . . has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman v. Hames*, 400 U.S. 309, 318-19, 91 S.Ct. 381, 386, 27 L.Ed.2d 408 (1971).

them were rendered unsafe, and in some instances, unlivable. 42 U.S.C. § 11901(3) ("drug dealers are increasingly imposing a reign of terror on public and other federally assisted low income housing tenants.") Yet, tenants were not cooperating with the efforts of local PHAs to address the drug problem, particularly because many of the tenants were part of the problem. "[W]hen suspected drug dealers were notified that eviction proceedings against them had been started, they sought to punish tenants who might have identified them." 134 Cong. Rec. E1965-02 (extended remarks of Rep. Rangel, June 14, 1998) (quoting Emmanuel P. Popolizio, *At Long Last, A Victory Over Drug Dealers,* N.Y.Times, May 21, 1988). As Judge Sneed points out, it was a rare factual situation to discover the tenant seated with the drug using guest. Absent this situation, the housing authority would be forced to rely on speculative evidence at best, such as hearsay, gossip and rumor. *See Rucker,* 237 F.3d at 1136 (Sneed, J., dissenting). Therefore, giving the housing authority the power to evict an ignorant tenant not only acts as a credible deterrent against criminal activity, it eliminates the need to happen upon the rare occurrence of joint wrongdoing, and diminshes [sic] the drug pusher's power of intimidation.

Similar to the factual situation in *Rucker,* Ms. Burton's son engaged in drug-related criminal activity outside of her apartment. As Judge Sneed points out, it is not likely that the tenant or the wrongdoer will admit to the fact that the tenant was aware of the drug-related criminal activity, especially since tenants and household members are often immediate family members. Hence, the only

reliable source would be other residents. However, Congress concluded that other residents were equally unlikely to present the necessary testimony. "Tenants are frightened. They are scared for themselves and their children. They are afraid to report drug incidents to the PHA management and to the police because usually nothing is done by either agency." *The Drug Problem and Public Housing: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, H.R.Rep. No. 101-1019, at 66 (1989) (summary of testimony of Nancy Brown, Chairperson, State of Connecticut Task Force on Public Housing and Drugs); "The fear of retaliation makes it almost impossible to provide normal police protection." H.R.Rep. No. 101-1019, at 69 (summary of testimony of Vincent Lane, Chairman, Chicago Housing Authority).

Hence, in an effort to gain the cooperation of public housing tenants, Congress fashioned § 1437d(l)(6) as a reasonable response to the legitimate housing objective of restoring these complexes to both livable and safe places of residence. In reaching this objective, Congress was aware, such as through the aforementioned testimony, that success could only be reached by ridding these public housing units of the drug-related criminal activity, and giving the lawabiding tenants control over their living situations. With the statute's passage, Congress addressed a very critical need, and clearly expressed concerns similar to those of Mayor James P. Moran Jr. of Alexandria, Virginia, who, arguing before a Senate subcommittee, stated that the eviction provision was critical to "giv[ing] a sense of control back to the tenant leadership within communities." *Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing*

and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, S. Doc. No. 101-234, at 27 (1989).

"Furthermore, a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants." *Rucker*, 237 F.3d at 1137 (Sneed, J., dissenting) (citing *Shepard v. Dye*, 137 Wash. 190, 252 P. 381 (1926)); Fed.Reg. at 51,566 (Oct. 11, 1991) (The "ability of PHA or other landlord to enforce covenants relating to acts of unit residents . . . is a normal and ordinary incident of tenancy.") The fact that these provisions are regularly used and enforced by private parties is a testament to their reasonableness.

Solely because one of the parties to this particular lease was a government agency does not render "an otherwise prudent provision unreasonable." *Rucker*, 237 F.3d at 1137 (Sneed, J., dissenting).[10] There are many examples of when governments impose liability of individuals without requiring that the individual have actual knowledge of the wrongdoing. *See e.g.* Conn. Gen. Stat. § 52-572 (imposing tort liability on "ignorant" parents for actions of their children); 42 U.S.C. § 9607 (property owner liable for environmental cleanup when waste was illegally [sic] by a previous owner without current

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[10] That one of the parties in this case is the government does not factor into whether or not the lease is reasonable. The constitutionality of the statute and its application is a separate question, and will be addressed below.

owner's knowledge or consent). Thus, it is established that congressional imposition of liability without fault on individuals is not, *per se*, unreasonable. Congress was well within reason in enacting § 1437d(l)(6) to combat the deteriorating livability of the public housing complexes. *Housing Lease and Grievance Procedures*, 56 Fed.Reg. at 51,567 ("Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents warranting special mention in the law.") Therefore, Congress's determination was wholly reasonable.

We now consider Ms. Burton's constitutional claims; specifically, that the district court erred in ruling that § 1437d(l)(6) does not violate her due process or freedom of association rights. We adopt the well reasoned analysis of Judge Sneed:

> Government plays many parts. When it acts in one of its many proprietary roles (employer, purchaser, or landlord, to name a few), it must be able to enforce reasonable and germane conditions. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation . . . or a criminal penalty at stake.") A government employer, for example, may impose restraints on employee speech that would violate the First Amendment if imposed on an ordinary citizen. *Pickering v. Bd. Of Educ. Of Township High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (applying intermediate rather than strict

scrutiny to dismissal of public school teacher for exercising First Amendment rights). Likewise, when the government acts to subsidize a purchase of certain services but not others, there may be no constitutional implications. *Maher v. Roe*, 432 U.S. 464, 475, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (subsidizing childbirth, but not abortion "does not interfere" with a fundamental right, but merely "encourages" childbirth).

When managing a public housing complex, the government's role is not unlike that of an employer or purchaser. The constitution does not require the government to provide decent and safe housing to its citizens. *Lindsey*, 405 U.S. at 74, 92 S.Ct. 862 (there is no "constitutional guarantee of access to dwellings of a particular quality.") The rights provided in the Housing Act of 1937 and its subsequent amendments arise from congressional notions of sound policy not constitutional necessity. In furtherance of such policy, Congress should be accorded considerable flexibility in fixing the necessary rules with which beneficiaries must comply.

In this case, Congress has limited the right to reside in public housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests. It has granted to PHAs the authority to withdraw this benefit from those who will not or cannot prevent their guests from engaging in such activity. So long as this condition is relevant to the government's underlying interest as a landlord, it is constitutionally permissible. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (if governmental purpose is sufficient to justify

outright refusal of benefit, it is sufficient to justify conditions on that benefit). *See also Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

In *Lyng v. Int'l Union, United Auto, Aerospace and Agric. Implement Workers of America, UAW ("UAW")*, 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988), the Supreme Court upheld the denial of food stamps to an entire household because a single member of that household was on strike. Like the tenants in the present case, the appellees in *UAW* argued that the statute unconstitutionally burdened the right to association because it "impermissibly directs the onus of the striker's actions against the rest of the family." *UAW*, 485 U.S. at 363, 108 S.Ct. 1184.

The denial of food stamps undoubtedly imposed a hardship on "innocent" family members. So long as non-striking family members continued to share their household with a striker, they were prohibited from enjoying a government benefit to which they were otherwise entitled. Although the Court recognized that associational rights were implicated by the food stamp statute, it held that the "withdrawal of a government benefit" did not pose a significant danger to the exercise of that constitutional right. *Id.* at 367 n. 5, 108 S.Ct. 1184.

In *UAW*, the Court also acknowledged that the means used by Congress in addressing this objective were imperfect because the "statute works at least some discrimination against strikers and their households." *Id.* at 371-72, 108 S.Ct. 1184 ("in terms of the scope and extent of their ineligibility for food stamps, § 109 is harder on strikers than voluntary quitters.")

> Nevertheless, the Court deferred to the congressional view of "what constitutes wise economic or social policy" and upheld the statute. *Id.* at 372, 108 S.Ct. 1184 (quoting *Dandridge v. Williams*, 397 U.S. at 486, 90 S.Ct. 1153.)

Rucker, 237 F.3d at 1138-1139 (Sneed, J., dissenting).

Similarly in *Califano v. Jobst*, 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977) the Supreme Court rejected a constitutional challenge to a provision of the Social Security Act. 42 U.S.C. §§ 402(d)(1)(D) and 402(d)(5) provided that a disabled child who was a beneficiary of social security benefits was entitled to continue to receive those benefits if he or she married someone who also received such benefits. However, if the disabled child married someone not entitled to these benefits, even if the spouse was a disabled person unable to provide the beneficiary with support, the benefits were terminated. In validating this provision, the Court stated that Congress' decision to use simple criteria, such as age and marital status, was rational. Furthermore, the Court stated that a case-by-case inquiry requiring individualized proof was unnecessary. "General rules are essential . . . even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Id.* at 53 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 776, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)). The Court found the scheme did not interfere with an individual's freedom to make a decision as important as marriage, and was "unquestionably valid." *Id.* at 54.

In *Chavez v. The Housing Authority of the City of El Paso*, 973 F.2d 1245 (5th Cir. 1992), the Fifth Circuit considered a similar provision to the one Ms. Burton now

challenges. In *Chavez*, the representative of the class action was evicted because of her adult child's violent acts on the premises.[11] In responding to the argument that the lease violated her First Amendment right to freedom of association, the court upheld the district court's finding that the parent-child relationship had nothing to do with the eviction decision. The court went on to say that there was nothing that demonstrated how enforcement of the lease impermissibly interfered with her right to associate with her family. There was no showing that the regulation at issue "burden[ed] a fundamental right by 'directly and substantially' interfering with family living arrangements." *Id.* at 1248 (quoting *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527 (1986)). Similarly, this Court can find no merit in the claim that Ms. Burton's freedom to associate with her son, any other family member, or acquaintance is burdened by the application of § 1437d(l)(6).

> In this case, the government has interrelated interests. Both reclaiming public housing from an epidemic of drug related crime and violence and empowering public housing residents to assist in this effort are indisputably legitimate objectives. The failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny. In determining who

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[11] Although Chavez had removed her son from the lease before the infraction, she was still subject to the lease's eviction penalties because her son was determined to be a guest, and this fell within the ambit of the lease's regulations, just as the provisions of § 1437d(l)(6) provide. Hence, any distinction between the case in *Chavez* and that of Ms. Burton is inconsequential.

> may reside in federally subsidized housing, Congress must draw distinctions "in order to make allocations from a finite pool of resources." *UAW*, 485 U.S. at 373, 108 S.Ct. 1184. *See also Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (holding that the government may condition welfare payments on a recipients [sic] agreement to permit warrantless homevisits by agency personnel).
>
> Section 1437d(*l*)(6) facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity. Because the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction. *HUD, One Strike and Your* [sic] *Out Policy in Public Housing*, 8 (March 1996).[12] The statute is, therefore, rationally related to Congress' legitimate objectives. No more is required. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 491, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977) (statute that "provides only rough justice . . . is [nevertheless] far from irrational.")

Rucker, 237 F.3d at 1139-1140 (Sneed J., dissenting).

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[12] "Even though the 'one strike' policy was implemented eight years after the passage of § 1437d(l)(6) it still may offer a legitimate rationale for the passage of the statute." *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1494 (9th Cir. 1993) ("A rational basis need not be one that actually motivated Congress. It is enough that plausible reasons for Congress' action exist." [citations omitted])" (quoting *Rucker*, 237 F.3d at 1140, n.15 (Sneed, J. dissenting)).

VI. Conclusion

While we acknowledge the potential for unfairness as a result of the Congressional authorization to evict ignorant tenants, we find that this is a necessary and just means of attaining a legitimate government objective. Public housing had deteriorated to unsafe and unlivable conditions, and Congress needed a remedy to eradicate the harmful element that had infiltrated these complexes. In bestowing discretion to public housing authorities, Congress acted rationally and well within its powers. We will not weaken the Congressional authority given to local housing authorities by writing into the statute an "innocent party" defense when the clear and unambiguous language of the statute is devoid of such. The authority that has been granted does not violate the Constitution. We therefore affirm the district court in all respects.

AFFIRMED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CONNIE BURTON, et al.,

Plaintiffs,

v.

CASE NO:
8:99-cv-1238-T-26B

TAMPA HOUSING AUTHORITY,

Defendant,

and

UNITED STATES OF AMERICA,

Intervenor.

_____/

ORDER

(Filed May 23, 2000)

This case involves Tampa Housing Authority's (THA) "One Strike" policy to evict tenants if a member of their household, unbeknownst to them, is arrested for participation in drug-related criminal activity. Plaintiff Connie Burton, a THA tenant since 1984, is subject to eviction based on the arrest of her son, a household resident, for participating in an illegal drug transaction. The transaction allegedly occurred on THA property, but outside of Burton's apartment. Burton maintains that she was unaware of her son's alleged participation in criminal activity. On April 29, 1999, THA notified Burton that her Dwelling Lease Agreement (Lease) would be terminated.

On May 12, 1999, THA initiated eviction proceedings against Burton.[1]

Burton brought the current lawsuit seeking to invalidate the actions taken by THA in terminating her Lease and initiating eviction proceedings.[2] Burton claims violations of the following: Equal Protection Clause; Due Process Clause; First Amendment; Administrative Procedure Act; Florida Residential Landlord and Tenant Act; and Public Housing Act. On December 23, 1999, the Court permitted the United States to intervene. The Court has pending for its consideration Plaintiffs' Renewed Motion for Summary Judgment (Dkt. 45); Defendant's Motion for Summary Judgment (Dkt. 52); and the United States' Motion to Dismiss (Dkt. 60). For the reasons that follow, the Court grants THA's motion for summary judgment.

The Public Housing Act states that each public housing agency shall utilize leases which "provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination

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[1] To the extent that Burton makes factual assertions that her son's inclusion as a household member on her Lease was a condition of his employment with THA, the Court finds that such facts are immaterial to the claims as framed by Burton.

[2] At the commencement of this action, Burton was joined by four other Plaintiffs. Those four other Plaintiffs have dismissed their cases against THA. Therefore, the Court confines its discussion to Burton's claims.

of the tenancy[.]" 42 U.S.C. § 1437d(l)(6). The federal regulations addressing leases under the Public Housing Act state that it is the tenant's obligation to "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near such premises." 24 C.F.R. § 966.4(f)(12)(i)(B). The regulations state that "[a]ny drug-related criminal activity on or near such premises" are grounds for termination of a Public Housing lease. 24 C.F.R. § 966.4(l)(2)(ii)(B).

Under the terms of Burton's Lease, she is obligated "To assure that Resident, Members of Resident's household, guests (as defined herein) or other person under Resident's control, shall not (i) engage in any criminal activity, that threatens the health, safety, or peaceful enjoyment of THA's property by other residents of THA or employees of THA; or (ii) drug-related criminal activity (as defined herein) upon or within two hundred (200) feet of THA's property, and such criminal activity shall be grounds for termination of this Agreement." Furthermore, an addendum to the Lease states: "THA considers activity which threatens the health, safety or peaceful enjoyment of THA's property by other residents, THA's employees, representatives, contractors, and agents and/or law enforcement officials, or drug-related criminal activity (as defined herein) on or off THA's property, by Resident, members of Resident's household or guests (as defined herein) as a serious violation of the material terms of this Agreement. THA has adopted a "One Strike" or "Zero Tolerance" policy with respect to these types of serious violations as required by Federal law and/or regulation. Eviction proceedings which result

from these types of serious violations of this Agreement are civil in nature, not criminal, and arrest and/or conviction of persons accused of these types of serious violations of this Agreement are not necessary as conditions to seek eviction." (Emphasis omitted.)

The Court notes that two Courts of Appeal have analyzed some of the issues that are the subject of the current controversy. In *Chavez v. Housing Authority of El Paso,* 973 F.2d 1245 (5th Cir. 1992), the El Paso Housing Authority initiated a forcible detainer action to evict a tenant based on the conduct of her son, a guest, in committing acts of violence on the premises in violation of the lease. The tenant sued for violation of the First Amendment right to freedom of association, the Equal Protection Clause, and the Due Process Clause. The Fifth Circuit held that the Housing Authority had not violated the tenant's constitutional rights.

In *Rucker v. Davis,* 203 F.3d 627 (9th Cir. 2000), the Oakland Housing Authority's (OHA) leases require tenants to assure that members of their household are not involved in drug-related criminal activity. OHA interprets this lease provision as authorizing eviction of a tenant based on a household member's drug-related criminal activity regardless of whether the tenant knew or reasonably should have known of the household member's drug-related criminal activity. In *Rucker,* OHA commenced wrongful detainer actions in California state court against several tenants after discovering a household member or guest of each tenant engaging in drug-related criminal activity on or near the public housing premises. The tenants filed suit in federal district court. The district court granted a preliminary injunction in

favor of tenants. The Ninth Circuit reversed, upholding OHA's application of § 1437d and holding, *inter alia*, that OHA had not violated the tenants' First Amendment right to freedom of association.

First, the Court concludes that § 1437d clearly and unambiguously authorizes THA's policy to initiate eviction proceedings based on the actions of household members. Burton argues that the Public Housing Act and its implementing regulations require the THA to exercise discretion in determining whether to evict a tenant. In support, Burton points to the terms of the Lease and a section of the federal regulations authorizing discretion on the part of THA. The Lease states: "In deciding to evict for criminal activity, THA shall have the discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by or awareness of household members, and the effects the eviction would have both on household members not involved in the proscribed activity and on other residents of THA. In appropriate cases, THA may permit continued occupancy by remaining household members and may impose a condition that household members who engaged in the proscribed activity will not reside in nor visit the dwelling. THA may require a household member who has engaged in the illegal use of drugs to present credible evidence, as determined by THA, of successful completion of a treatment program as a condition to being allowed to reside in the dwelling." The federal regulations provide: "In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness

of the offense, the extent of participation of family members, and the effects the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit." 24 C.F.R. § 966.4(l)(5)(I).

While the above provisions authorize public housing agencies to make eviction decisions on a case-by-case basis, they do not mandate such discretionary review. This is consistent with the general policy of the Public Housing Act to give local public housing authorities the maximum amount of responsibility in the administration of their programs. *See Gholston v. Housing Auth. of City of Montgomery*, 818 F.2d 776, 778 (11th Cir. 1987); *Rucker*, 203 F.3d at 638-639.

Burton argues that the legislative history of § 1437d demonstrates that Congress intended case-by-case eviction determinations. Burton cites the following language: "This provision makes criminal activity grounds for eviction of public housing tenants if that action is appropriate in light of all the facts and circumstances. . . . This section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction only if it adversely affects the health, safety, and quiet enjoyment of the premises. The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and

the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." S. Rep. No. 101-316 (1990). As in *Rucker*, the Court concludes the resort to legislative history is not necessary when the statute is clear. *See* 203 F.3d at 646.[3] In addition, the Court finds that the Lease sufficiently incorporates the terms of § 1437d and the implementing regulations. Therefore, the Court will grant summary judgment in favor of THA on Counts IV and VI of the complaint.

Second, the Court concludes that THA is entitled to summary judgment on Burton's substantive due process, equal protection, and First Amendment claims. There is a rational basis for applying the One Strike Policy across-the-board to all tenants based on the actions of their household members. That rational basis includes the severity of drug-related crime in public housing, the high cost of requiring public housing agencies to litigate scienter, and the creation of a strong incentive to ensure that household members and guests of public housing tenants do not engage in illegal drug transactions. *See Rucker*, 203 F.3d at 643-644. Moreover, as discussed above, *Rucker* rejected First Amendment claims, and *Chavez* rejected due process, equal protection, and First Amendment claims. Following *Rucker* and *Chavez*, the Court will grant THA's

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[3] Moreover, the example cited in the history pertains to guests rather than household members. Thus, to some extent, the history is not clear as to whether a public housing authority would be expected to conduct an individualized inquiry where a household member is arrested for drug related criminal activity.

motion for summary judgment on Burton's substantive due process,[4] equal protection, and First Amendment claims contained in counts I, II, and III of the complaint.

Third, the Court concludes that THA is entitled to summary judgment on Burton's procedural due process claim because Florida law provides the basic elements of due process. Public housing agencies are permitted to exclude from their grievance procedure an eviction involving drug-related criminal activity, providing that the laws of the jurisdiction require a hearing in court prior to eviction. *See* 42 U.S.C. § 1437d(k). The federal regulations define "elements of due process" as "an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required: (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction; (2) Right of the tenant to be represented by counsel; (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; (4) A decision on the merits." 24 C.F.R. § 966.53(c). The Department of Housing and Urban Development has determined that

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[4] To the extent that Burton attempts to raise a claim of arbitrary enforcement, her deposition testimony does not support such a claim. *See* Burton deposition at pp. 90-92. Furthermore, THA's Drug-Related Criminal Activity Move-out or Eviction Report demonstrates that eviction notices were made across-the-board, regardless of the circumstances of each case, refuting any claim of arbitrary enforcement. *See* Plaintiffs' Response in Opposition to Defendant Tampa Housing Authority's Motion for Summary Judgment, exhibit 14 (Dkt. 64).

Florida law satisfies due process. *See* PH Due Process Determination: Florida, Directive Number: GCH-0078 (Sept. 4, 1992), attached to Memorandum of Law in Support of Defendant Tampa Housing Authority's Motion for Summary Judgment (Dkt. 53) as exhibit I. The Eleventh Circuit has held that Florida eviction proceedings satisfy constitutional procedural due process. *See Colvin v. Housing Auth. of the City of Sarasota*, 71 F.3d 864 (11th Cir. 1996); *see also White v. Seattle Housing Auth.*, 1999 WL 595343 (9th Cir. Aug. 9, 1999) (unpublished opinion) (Washington unlawful detainer proceedings provide procedural due process). Therefore, the Court will grant summary judgment in favor of THA on Burton's procedural due process claim contained in counts I and III of the complaint.

Finally, the Court concludes that Burton's claim under the Florida Residential Landlord and Tenant Act is preempted to the extent that it conflicts with the Public Housing Act. Therefore, the Court will grant summary judgment in favor of THA on Count V of the complaint.

Accordingly, it is ordered:

1) Plaintiffs' Renewed Motion for Summary Judgment (Dkt. 45) is denied.

2) Defendant's Motion for Summary Judgment (Dkt. 52) is granted as to Plaintiff Connie Burton.

3) The United States' Motion to Dismiss (Dkt. 60) is denied as moot.

4) Plaintiffs' motion for preliminary injunction (Dkt. 2) is denied.

5) The Clerk is directed to enter judgment in favor of Defendant Tampa Housing Authority and against Plaintiff Connie Burton.

6) The Clerk is directed to close this file.

DONE AND ORDERED at Tampa, Florida, on May 23, 2000.

/s/ Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record
Courtroom Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CONNIE BURTON, et al.,

Plaintiffs,

v.

CASE NO:
8:99-cv-1238-T-26B

TAMPA HOUSING AUTHORITY,

Defendant,

and

UNITED STATES OF AMERICA,

Intervenor.

_____/

ORDER

(Filed Jun. 9, 2000)

Before the Court is Plaintiff Connie Burton's Motion to Amend Trial Court Findings, to Reverse a Summary Judgment entered in favor of Defendant the Tampa Housing Authority, and Burton's Renewed Motion for Summary Judgment in favor of Burton (Dkt. 82). On May 23, 2000, the Court granted Tampa Housing Authority's (THA) Motion for Summary Judgment and upheld the constitutionality of the provisions of the Public Housing Act that permit eviction of public housing tenants based on the illegal drug activity of their household members. In her motion for reconsideration, Plaintiff Connie Burton argues that THA forced her to list her son as a household member, and that her son was not living with her or

under her control at the time of the illegal drug activity which resulted in the institution of eviction proceedings. Having upheld the legality of the subject provisions of the Public Housing Act, the Court concludes that the factual determination of whether Burton was coerced to list her son as a household member, and whether he was under her control at the time of the illegal drug activity, are questions that should be resolved in the first instance by the state court in Plaintiff's eviction proceedings. *See* § 83.60, Fla. Stat. (1999) (providing procedure for raising defenses to action for possession). Accordingly, it is ordered that Plaintiff Connie Burton's Motion to Amend Trial Court Findings, to Reverse a Summary Judgment entered in favor of Defendant the Tampa Housing Authority, and Burton's Renewed Motion for Summary Judgment in favor of Burton (Dkt. 82) is denied.

DONE AND ORDERED at Tampa, Florida, on June 9, 2000.

/s/ Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

AMENDMENT V to the UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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42 U.S.C. § 1437d. Contract provisions and requirements; loans and annual contributions

* * *

(*l*) Leases; terms and conditions; maintenance; termination

Each public housing agency shall utilize leases which –

> **(1)** have a term of 12 months and shall be automatically renewed for all purposes . . .
>
> **(2)** do not contain unreasonable terms and conditions;
>
> **(3)** obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition;

(4) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than –

(A) a reasonable time, but not to exceed 30 days –

(i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or

(ii) in the event of any drug-related or violent criminal activity or any felony conviction;

(B) 14 days in the case of nonpayment of rent; and

(C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply;

(5) require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;

(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy; and

(7) specify that with respect to any notice of eviction or termination, notwithstanding any

State law, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

* * *

For purposes of paragraph (6), the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act).

CODE OF FEDERAL REGULATIONS
TITLE 24 – HOUSING AND URBAN DEVELOPMENT
SUBTITLE B – REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT
CHAPTER IX – OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PART 966 – PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE
SUBPART A – DWELLING LEASES, PROCEDURES AND REQUIREMENTS
§ 966.4 Lease requirements.

A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.

* * *

(f) Tenant's obligations. The lease shall provide that the tenant shall be obligated:

* * *

(12)(i) To assure that no tenant, member of the tenant's household, or guest engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on or off the premises;

(ii) To assure that no other person under the tenant's control engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on the premises;

* * *

(*l*) Termination of tenancy and eviction. –

(1) Procedures. The lease shall state the procedures to be followed by the PHA and by the tenant to terminate the tenancy.

(2) Grounds for termination of tenancy. The PHA may terminate the tenancy only for:

(i) Serious or repeated violation of material terms of the lease, such as the following:

(A) Failure to make payments due under the lease;

(B) Failure to fulfill household obligations, as described in paragraph (f) of this section;

(ii) Other good cause. Other good cause includes, but is not limited to, the following:

(A) Criminal activity or alcohol abuse as provided in paragraph (*l*)(5) of this section;

* * *

(5) PHA termination of tenancy for criminal activity or alcohol abuse.

(i) Evicting drug criminals.

(A) Methamphetamine conviction. The PHA must immediately terminate the tenancy if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(B) Drug crime on or off the premises. The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

* * *